

REMARKS

A listing of the claims has not been provided as none of the claims were amended. Claims 18-22 and 63-70 remain pending. Applicants believe the pending application is in condition for allowance.

Claims 18-22 and 63-70 stand rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Pub. No. 2001/0014486 (Glenn) in view of U.S. Patent No. 7,067,358 (Chen-Tung). Reconsideration is respectfully requested in view of the following remarks.

Submitted concurrently herewith is a Declaration of Bret K. Street, James M. Derderian, and Jeremy E. Minnich Under 37 CFR 1.131 (the Declaration), executed by the joint inventors of the claimed invention. The Declaration establishes a “prior invention” with respect to the effective date of the Chen-Tung reference (i.e., November 4, 2003). That is, the Declaration establishes conception of the claimed invention prior to the effective date of the Chen-Tung reference (i.e., November 4, 2003) coupled with due diligence from prior to the reference date to the filing date of the present application on January 6, 2004.

Although the Office Action’s rejections are based on 35 U.S.C. §103(a), the Chen-Tung reference cited by the Office Action is used as a §102(e) reference. Applicants respectfully submit that Chen-Tung is not a proper §102(e) reference, and cannot be used against the present application for the reasons set forth above. *See* M.P.E.P. § 715.07. “A rejection based on 35 U.S.C. 102(e) can be overcome by . . . [f]iling an affidavit or declaration under 37 CFR 1.131 showing prior invention.” M.P.E.P. § 706.02(b).

The relevant portion of 37 CFR 1.131 states: “(a) When any claim of an application or a patent under reexamination is rejected, the inventor of the subject matter of the rejected claim . . . may submit an appropriate oath or declaration to establish invention of the subject matter of the rejected claim prior to the effective date of the reference or activity on which the rejection is based.” *Id.* (emphasis added). The Declaration properly establishes invention of the subject matter of the

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rejected claims prior to the effective date of the reference cited. Accordingly, Chen-Tung cannot be used as prior art under any provision of §102.

In view of the above amendment, applicant believes the pending application is in condition for allowance.

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Respectfully submitted,

By 

Thomas J. D'Amico

Registration No.: 28,371
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006-5403
(202) 420-2200
Attorney for Applicant